Supreme Court
FILED

99 942 DEC 2 - 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

NATIONAL AMERICAN INSURANCE COMPANY

and

GULF INSURANCE COMPANY,

Petitioners,

v.

RUPPERT LANDSCAPE COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

BENJAMIN T. RIDDLES
Counsel of Record
RICHARD G. MANN, JR.
WATT, TIEDER, HOFFAR
& FITZGERALD, L.L.P.
7929 Westpark Drive, Suite 400
McLean, Virginia 22102
(703) 749-1000
Attorneys for Petitioners

December 2, 1999

488

QUESTION PRESENTED

Are claims for injuries to a private party's business preempted under 11 U.S.C. § 548 by a bankruptcy trustee's unasserted potential claim for a related fraudulent conveyance without a showing of interference with the bankruptcy estate?

PARTIES TO THE PROCEEDING

Petitioner National American Insurance Company is not a publicly held entity, but is a wholly owned subsidiary of Chandler Insurance Company, Ltd., which is publicly held. Petitioner Gulf Insurance Company is not a publicly held entity. Citigroup and Travelers Property Casualty Corporation, which are publicly held corporations, each own at least ten percent of Gulf Insurance Company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

The Underlying Events 3

The Proceedings Below 7

REASONS FOR GRANTING THE PETITION . . 11

I. The Petition Should Be Granted Because The Fourth Circuit's Ruling Depriving The Sureties Of

Standing To Assert Tort And Indemnity Claims For Damages Peculiar To Them Conflicts With Rulings By This Honorable Court And Other Courts of Appeals ... 11

II. The Petition Should Be Granted Because The Fourth Circuit Created An Unworkable And Unfair Rule Of Claim Preclusion .. 14

CONCLUSION 16

APPENDIX ..... Attached

TABLE OF AUTHORITIES

Cases: Page

Caplin v. Marine Midland Grace Trust Company,
406 U.S. 416 (1972) ... 11, 12, 13, 14, 16

E.F. Hutton & Co. v. Hadley,
901 F.2d 979 (11th Cir. 1990) 12

In re Folks,
211 B.R. 378 (Bankr. 9th Cir. 1997) 16

In re MortgageAmerica Corp.,
714 F.2d 1266 (5th Cir. 1983) 13

In re Ozark Restaurant Equip. Co.,
816 F.2d 1222 (8th Cir.),
cert. denied, 484 U.S. 848 (1987) 13

In re Schimmelpenninck,
183 F.3d 347 (5th Cir. 1999) 14

Koch Refining v. Farmers Union Cent. Exch., Inc.,
831 F.2d 1339 (7th Cir. 1987),
cert. denied, 485 U.S. 906 (1988) 13

St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.,
884 F.2d 688 (2d Cir. 1989) 12

Steyr-Daimler-Puch of America Corp. v. Pappas,
852 F.2d 132 (4th Cir. 1988) 12

Williams v. California 1st Bank,
859 F.2d 664 (9th Cir. 1988) 12, 13

Statutes:

11 U.S.C. § 362 ..... 4, 8
11 U.S.C. § 548 ..... i, 2, 6
28 U.S.C. § 1245(1) 2
28 U.S.C. § 1332 7

Federal Rules of Civil Procedure:

Rule 23 12

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

NATIONAL AMERICAN INSURANCE COMPANY

and

GULF INSURANCE COMPANY,

Petitioners,

v.

RUPPERT LANDSCAPE COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

National American Insurance Company ["National"] and Gulf Insurance Company ["Gulf"], [collectively the "Sureties"], respectfully petition for a

writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's decision, published at 187 F.3d 439, is reproduced in the Appendix (App.) at 1. The district court's memorandum opinion and order dismissing the Sureties' action are reproduced at App. 8.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered August 6, 1999. The court of appeals denied a timely petition for rehearing and rehearing en banc on September 3, 1999. This Court has jurisdiction to issue the writ under 28 U.S.C. § 1245(1).

STATUTORY PROVISION INVOLVED

This case requires an analysis to resolve the inherent tension that exists between the statutory authority of bankruptcy trustees to pursue claims of the estate under 11 U.S.C. § 548 and the rights of third parties and creditors of the estate to pursue separate and distinct claims involving related misconduct. The text of Section 548 is set forth at App. 19. This analysis is particularly critical in the

absence of statutes or judicial decisions guiding a preemption analysis.

STATEMENT OF THE CASE

A. The Underlying Events

The Sureties issued bonds for certain landscape projects to Green Thumb Enterprises, Inc. ("Green Thumb"), a landscaper not a party to this action. Green Thumb defaulted on the bonded projects, causing significant monetary loss to the Sureties. The Sureties believe the defaults were caused when Respondent Ruppert Landscape Company, Inc. ("Ruppert"), knowingly purchased all of Green Thumb's valuable assets and employed approximately 100 Green Thumb employees, thereby rendering Green Thumb unable to complete the bonded projects or pay its creditors.

In the early 1990's, Green Thumb was one of the largest landscaping companies in the Washington, D.C. metropolitan area. By June 1995, however, Green Thumb was in financial trouble. Its bank had refused to renew Green Thumb's revolving line of credit and, instead, had converted the debt to a term loan.

Ruppert, a competitor of Green Thumb, heard of its financial difficulties and arranged a meeting with

Green Thumb "to talk about business opportunities." Soon thereafter, Ruppert provided Green Thumb with a proposal for the purchase of select assets. On July 31, 1995, Ruppert entered into three separate agreements to effect the purchase of select assets from Green Thumb.[1] Green Thumb continued to experience cash flow problems shortly after the sale and defaulted on various financial and contractual commitments. Green Thumb also defaulted on landscape contracts that the Sureties had bonded.

In light of the above, the Sureties initiated involuntary bankruptcy proceedings against Green Thumb on October 27, 1995. Ruppert and the Sureties timely filed proofs of claims. Ruppert moved to lift the automatic stay, pursuant to 11 U.S.C. § 362, to enforce a security interest in certain of Green Thumb's accounts receivable obtained from the bank in connection with the assets purchase. A hearing on Ruppert's motion was held on December 20, 1996. After hearing testimony from representatives of Green Thumb, Ruppert, and Green Thumb's bank, the bankruptcy court granted Ruppert's motion to lift stay. The court stated with regard to Ruppert's

---

[1] Other details of the parties' various proposals and agreements, while relevant to the claims alleged in the Sureties' Complaint, are of no import in this appeal as the district court never addressed the merits of the Sureties' factual claims.

purchase of the bank's term loan to Green Thumb and security agreement:

> But it's clear that in entering into this transaction, Rupert [sic] intended to keep that note and security agreement alive, to protect itself against the fact that it was having to — in order to release NationsBank's lien against the maintenance contracts it was having to pay out-of-pocket itself. And I see no reason in this particular case to disregard the form of the transaction which is consistently documented and does not appear to have been engaged in for any ulterior purpose.

The bankruptcy court also stated:

> Thus, as a practical matter, it appears that there is no equity in those receivables for the estate, since it does not appear that the — Rupert [sic] has a valid lien against those receivables. And, of course, this is not a reorganization proceeding, so that the receivables are not necessary for an effective reorganization of the Debtor. Accordingly, based on the showing that has been made of lack of equity in

those receivables, I am going to grant relief from the automatic stay and to the extent of the permitting the — Rupert [sic] to collect on the receivables that are -- were pledged to it under the security agreement. None of my rulings here today are intended to prejudice the Trustee with respect to any possible Section 548 action here. I'm not making any rulings or findings that the Debtor received reasonably equivalent value with respect to the sale of its assets to Rupert [sic]. I frankly just don't think I have enough evidence in front of me right now, and *a relief from stay hearing is intended to be as summary in nature and to really determine a preliminary matter whether the Debtor — whether the secured creditor has a lien and whether it should have the right to enforce that lien.* And it's not my intent here to make any rulings that would be binding in a Section 548 action, which is a different creature altogether. I don't mean by saying that to say that I think there is a 548 action here, but I simply — that would involve me getting into issues that I don't think I have enough evidence in front of me right now to

> decide. For example, what is the actual value of the automobiles. We know what they were purchased for, what their liens were and, to some extent, what Rupert [sic] hoped to get from them after they had fixed them up and sold them, but that doesn't really tell us what they were worth, so I'm not going to get into those issues. But, as far as the Debtor having the — or excuse me, not the Debtor — the creditor, Rupert [sic], here, I will lift the stay to permit it to pursue the receivables due to Green Thumb, Inc.

B. The Proceedings Below

The Sureties filed the present action against Ruppert on May 30, 1997, alleging claims of tortious interference with contract, statutory and common law conspiracy, and successor liability. The district court possessed jurisdiction under 28 U.S.C. § 1332. The Sureties sought compensatory damages under tort and indemnification theories for injuries to their businesses caused by Ruppert as well as punitive and statutory treble damages. The Sureties were not seeking to rescind the asset sale or to obtain the difference between the value of Green Thumb's assets and the amount paid by Ruppert.

After relevant discovery, the parties filed cross motions for summary judgment. Ruppert's motion argued in pertinent part (1) that the Sureties lacked standing to bring a claim for fraudulent transfer or successor liability and (2) that the ruling of the bankruptcy court lifting the automatic stay as to Ruppert's security interest in Green Thumb's account receivables should be given broad res judicata or collateral estoppel effect to bar the Sureties' claims.

In opposition to Ruppert's motion, the Sureties clarified that their Complaint did not include a fraudulent transaction claim and did not seek rescission of the asset purchase. As to Ruppert's argument concerning standing to assert the successor liability claim, the Sureties explained the difference between alter ego liability and successor liability under Virginia law and delineated how the property of an alter ego would be property of the bankruptcy estate whereas a corporation could have successor liability without its property becoming estate property. Finally, the Sureties explained that the lift stay ruling had no preclusive effect because rulings lifting an automatic stay under 11 U.S.C. § 362 are not final judgments, because the allegedly preclusive findings were not necessary to the lift stay ruling, and because the asserted rulings pertained to Ruppert's dealings with the bank and not to Ruppert's purchase of Green Thumb's assets.

Notwithstanding extensive evidentiary presentations concerning the transactions, the district court focused its decision on Ruppert's arguments concerning standing and the res judicata or collateral estoppel effect of the bankruptcy court's "ruling" in the lift stay proceeding. The district court granted Ruppert's motion, finding (1) that the Sureties were without standing to bring suit, as their claims could only be brought by the bankruptcy trustee and (2) that the bench ruling of the bankruptcy court in the lift stay proceeding precluded the Sureties' claims on the basis of res judicata and/or collateral estoppel. App. 12-14. The district court made no references to any of the numerous documents and deposition transcripts provided with regard to the substantive state law claims for tortious interference with contract, statutory and common law conspiracy, and successor liability, provided no findings with regard to those facts, and stated no conclusions of law regarding the effect of those facts on the legal analysis of the substantive claims.

Significantly, although the district court's decision was based primarily on a preemption analysis, which accords the bankruptcy trustee only a first opportunity to bring a claim, the court dismissed the Sureties' claims with prejudice.

The Sureties timely appealed to the United States Court of Appeals for the Fourth Circuit, which

affirmed the district court's order. The opinion ignored the district court's preclusion ruling based on the bankruptcy court's preliminary determination in the Green Thumb lift stay hearing. App. 7. The panel instead focused on the district court's standing ruling and on various policy arguments thought to support the standing ruling. App. 4-6.

Although the court of appeals asserted that "the trustee's role is to bring suits such as these on behalf of all creditors", the panel made no analysis of whether the trustee even had standing to assert the Sureties' claims or special damages. App. 6. The panel concluded that depriving individual creditors of standing to pursue their own claims against third parties was necessary to "maintain the integrity of the bankruptcy proceeding" and to prevent "a multijurisdictional rush to judgment." App. 6-7.

Apparently because the district court made no finding of interference with the bankruptcy estate, the court of appeals' comments were general and apply to all claims related to potential claims by a bankruptcy trustee, regardless of whether the bankruptcy proceedings actually would be affected.

REASONS FOR GRANTING THE WRIT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S RULING DEPRIVING THE SURETIES OF STANDING TO ASSERT TORT AND INDEMNITY CLAIMS FOR DAMAGES PECULIAR TO THEM CONFLICTS WITH RULINGS BY THIS HONORABLE COURT AND OTHER COURTS OF APPEALS.

The Fourth Circuit has established a rule in this case depriving private litigants of standing to assert claims related to potential claims by bankruptcy trustees. The rationale of the court of appeals' decision conflicts with decisions by this Honorable Court and other courts of appeals and merits review to clarify the circumstances and limits for precluding private parties from asserting claims that may relate to a bankruptcy proceeding.

In Caplin v. Marine Midland Grace Trust Company, 406 U.S. 416 (1972), the Court addressed an issue related to a bankruptcy trustee's standing to bring claims possessed by other parties. There, the trustee had asserted on behalf of debenture holders claims of misconduct by an indenture trustee. The Court ruled that the trustee had no authority "to collect money not owed to the estate." Id. at 428.

Importantly, the Court concluded that the suit by the trustee would not pre-empt independent suits by debenture holders, but would create difficult issues arising from the differing interests of the trustee and the bondholders. Id. at 431-432. For example, the trustee and bondholders could disagree as to what damages to seek, the theory on which to sue and who was bound by any settlement. Faced with these issues, the Court concluded that the individual bondholders should be permitted to bring their own suits and that possible problems due to multiple suits could be resolved using class actions under Rule 23 of the Federal Rules of Civil Procedure. Id. at 433.

The Eleventh Circuit in E.F. Hutton & Co. v. Hadley, 901 F.2d 979 (11th Cir. 1990), applied Caplin to bar a bankruptcy trustee from asserting the personal claims of creditor securities owners against a broker. The court of appeals recognized "that there has been divergence among the circuits concerning the ability of a bankruptcy trustee to bring actions against third parties on behalf of creditors of the bankrupt."[2] Id. at 985.

---

[2]The court of appeals cited the following cases as examples of the split among the circuits: *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688 (2d Cir. 1989) (trustee can assert alter ego action); *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988) (discussed above); *Steyr-Daimler-Puch of America Corp. v. Pappas*, 852 F.2d 132 (4th Cir. 1988) (trustee can assert alter ego action); *Koch Refining*

The Ninth Circuit in Williams v. California 1st Bank, 859 F.2d 664 (9th Cir. 1988), extended Caplin to prevent a trustee from asserting federal securities law claims on behalf of creditors against a bank even though the creditors had assigned their claims to the trustee. Id. at 667. The court of appeals shared the concern expressed in Caplin that "actions by those who did not assign" could be inconsistent with the trustee's action. Id. Thus, the Caplin and Williams decisions plainly repudiate the Fourth Circuit's ruling precluding private parties from asserting separate rights of action related to bankruptcy matters.

Accordingly, a writ of certiorari should be granted to resolve a divergence of law in the circuits and to provide authoritative guidance as to the circumstances and limits by which a bankruptcy trustee's potential rights of action might preclude or limit a private party's right of action to redress particularized injuries.

---

v. Farmers Union Cent. Exch., Inc., 831 F.2d 1339 (7th Cir. 1987) (trustee can assert alter ego action), *cert. denied*, 485 U.S. 906 (1988); *In re Ozark Restaurant Equip. Co.*, 816 F.2d 1222 (8th Cir.) (individual creditors must assert alter ego action), *cert. denied*, 484 U.S. 848 (1987); *In re MortgageAmerica Corp.*, 714 F.2d 1266 (5th Cir. 1983) (trustee must bring fraudulent conveyance action)

II

THE PETITION SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT CREATED AN UNWORKABLE AND UNFAIR RULE OF CLAIM PRECLUSION.

The Fourth Circuit's ruling plainly may cause grave injustices and deprivations of constitutional rights to property. As an example, under Caplin v. Marine Midland Grace Trust Company, supra, the trustee for Green Thumb's bankruptcy estate did not have standing to assert the particularized damages incurred by the Sureties. These personal claims included the bond losses caused by Ruppert's conspiracies and tortious interference with contract. At most, the trustee could assert generalized claims common to all creditors. See In re Schimmelpenninck, 183 F.3d 347, 359-361 (5th Cir. 1999). Neither the trustee nor the Sureties had a right to assert the Sureties' personal damages under the Fourth Circuit's ruling. As a result, the dismissal with prejudice of the Sureties' claims unfairly deprived the Sureties of personal property.

Moreover, the Fourth Circuit's ruling will spawn unnecessary litigation concerning claim preclusion. For instance, parties will litigate the standard for determining whether a private party's claim relates sufficiently to a potential claim by a trustee to justify

preclusion of the claim. The only guidance provided by the panel's opinion were expressions that the trustee's potential fraudulent conveyance action and the Sureties' actions shared the "same focus" and were "similar in object and purpose." App. 4-5. Here, however, the trustee's potential action would be limited to return of the assets or part of their value. In contrast, the Sureties sought compensatory damages and indemnification for their particularized bond losses as well as punitive and statutory treble damages. Given these extreme differences in the damages sought, the panel's expressions provide little objective guidance.

Further, the opinion below invites litigation concerning when a trustee has abandoned a claim. Moreover, the proof necessary to prove abandonment and the timing of motions to declare claims abandoned surely will be disputed. The rulings on these disputes also will be unpredictable and often harsh. For example, in the case below, although no evidence was presented that the trustee had filed a claim against Ruppert or had any intent to file such a claim, the Sureties' claims were dismissed with prejudice.

Somewhat similarly, a creditor in another bankruptcy moved for an order declaring that the trustee had abandoned a claim. The bankruptcy court issued a nunc pro tunc order, which rendered

the creditor's complaint out of time and time barred. In re Folks, 211 B.R. 378, 388 (Bankr. 9th Cir. 1997). Unpredictable results such as these could be expected while the lower courts wrestle with the ambiguities posed by the Fourth Circuit's ruling.

Accordingly, the writ should be granted so that this Honorable Court might provide guidance on the proper procedures and standards for evaluating bankruptcy preemption issues to prevent such anomalous and unfair results.

CONCLUSION

This case presents a question of substantial importance — whether a private party's claim for particularized injuries can be precluded by a potential related claim by a bankruptcy trustee without any showing of impairment to the bankruptcy estate. If the opinion below is allowed to stand the decisions of the various courts of appeals will be in conflict and litigants will have virtually no guidance as to when preemption might occur or how or when a trustee's claims may be determined to be abandoned. By granting the petition for certiorari, this Court can correct the Fourth Circuit's decision and reaffirm the continuing vitality of the Court's decision in Caplin.

Accordingly, the Sureties respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

BENJAMIN T. RIDDLES
Counsel of Record
RICHARD G. MANN, JR.
WATT, TIEDER, HOFFAR
& FITZGERALD, L.L.P.
7929 Westpark Drive,
Suite 400
McLean, Virginia 22102
(703) 749-1000
Attorneys for Petitioners

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

NATIONAL AMERICAN INSURANCE COMPANY
and
GULF INSURANCE COMPANY,
Petitioners,
v.

RUPPERT LANDSCAPE COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Fourth Circuit, Filed August 6, 1999 1

Memorandum Opinion and Order of the United States District Court for the Eastern District of Virginia, Filed Marched 20, 1998 8

United States Code, Title 11, Section 548 19

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1562

NATIONAL AMERICAN INSURANCE COMPANY;
GULF INSURANCE COMPANY,
Plaintiffs-Appellants,

v.

RUPPERT LANDSCAPING COMPANY, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
Claude M. Hilton, Chief District Judge.
(CA-97-847)

Argued: June 10, 1999
Decided: August 6, 1999

Affirmed by published opinion. Chief Judge WILKINSON wrote the opinion, in which Judge ERVIN and Judge MICHAEL joined.

OPINION

WILKINSON, Chief Judge:

Two insurance companies seek to challenge the validity of an asset transfer between a now-bankrupt party and Ruppert Landscaping Company by suing Ruppert in district court. The district court granted summary judgement to Ruppert. Because standing to challenge the validity of the transfer rests with the trustee in bankruptcy, we affirm judgment of the district court.

I.

This case stems from the financial difficulties and ultimate bankruptcy of Green Thumb Enterprises (Green Thumb), which in the early 1990s was one of the largest landscaping companies in the Washington, D.C. metropolitan area. During the course of Green Thumb's operations, the National American Insurance Company and the Gulf Insurance Company (collectively Sureties) issued numerous payment and performance bonds on behalf of Green Thumb for various landscape

installation and maintenance contracts.

In mid-1995, Green Thumb entered into a series of agreements with another landscaping company, Ruppert Landscaping Company (Ruppert). Most importantly for this case, Ruppert agreed to purchase a few of Green Thumb's notes from its primary lender and also to purchase some of Green Thumb's assets.

During the following months Green Thumb experienced financial difficulties and defaulted on landscape contracts that were bonded by the Sureties. In October 1995, the Sureties filed an involuntary bankruptcy petition against Green Thumb. The bankruptcy ultimately became a Chapter 7 proceeding and a trustee was appointed.

In January 1996, Ruppert moved to lift the automatic stay pursuant to 11 U.S.C. § 362 in connection with its secured claims. The bankruptcy court granted Ruppert's motion. The Sureties then brought suit in district court challenging Ruppert's transactions with Green Thumb. The Sureties pursued a variety of counts: successor liability, tortious interference with contract, and statutory and common law conspiracy. The district court granted summary judgment to Ruppert finding that the Sureties' claims were barred by res judicata and collateral estoppel. The Sureties now appeal.

II.

The Sureties argue that they have standing to bring their claims in district court. If a cause of action is part of the estate of the bankrupt then the trustee alone has standing to bring that claim. *See Steyr-Daimler-Puch of Am. Corp. v. Pappas*, 852 F.2d 132, 136 (4th Cir. 1988). The Sureties assert that since their claims are not property of the estate, they can bring their claims directly against Ruppert in district court.

We disagree. The bankruptcy court noted that the trustee has a potential fraudulent conveyance action to challenge the legality of the transaction between Ruppert and Green Thumb. *See* 11 U.S.C. § 548. All of the Sureties' claims have this same focus. To make out their successor liability claim the Sureties rely heavily on exposing the Ruppert/Green Thumb transaction to be fraudulent in fact. *See Harris v. T.I., Inc.*, 413 S.E.2d 605, 609 (Va. 1992). The Sureties' tortious interference with contract and conspiracy claims likewise depend on showing fraud or other unlawful action with regard to Ruppert's purchase of Green Thumb's assets. *See Chaves v. Johnson*, 335 S.E.2d 97, 102 (Va. 1985) (tortious interference with contract); *Allen Realty Corp. v. Holbert*, 318 S.E.2d 592, 596 (Va. 1984) (statutory conspiracy); *Commercial Business Systems, Inc. v.*

BellsSouth Services, Inc., 453 S.E.2d 261, 267 (Va. 1995) (common law conspiracy). In fact, the Sureties' complaint and briefs abound with examples and allegations of the improper and illegal nature of this transaction. Although the Sureties' claims and the trustee's fraudulent conveyance claim do not contain identical elements, they all share this same underlying focus. *See Litchfield Co. v. Anchor Bank (In re Litchfield Co.)*, 135 B.R. 797, 804 (W.D.N.C. 1992) (even though claims of the debtor and an individual creditor are "not identical" the court can stay proceedings initiated by the creditor in order to avoid "interfering with the property of the estate").

The Sureties' causes of action are thus so similar in object and purpose to claims that the trustee could bring in bankruptcy court that the Sureties lack standing to pursue these claims in district court. Until the trustee has abandoned his potential fraudulent conveyance action, the Sureties cannot proceed with their claims in district court. In fact, this circuit has explicitly held that until there is an "abandonment" by the trustee of his claim the individual creditor has no standing to pursue it. *See Steyr-Damler-Puch*, 852 F.2d at 136; *see also Chicago Truck Drivers, Helpers and Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 51 (7th Cir. 1995) (specifically allowing successor liability suit because the bankruptcy proceeding had concluded).

It is clear that the trustee should have first crack at challenging the Ruppert/Green Thumb transaction — the trustee's role is to bring suits such as these on behalf of all the creditors. *See Steyr-Daimler-Puch*, 852 F.2d at 135. As a general matter, "[the trustee's single effort eliminates the many wasteful and competitive suits of individual creditors." *Koch Ref. v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1342-43 (7th Cir. 1987). All creditors, not simply the Sureties, have a stake in exposing any impropriety in the Ruppert/Green Thumb transaction. If Ruppert secured a transfer of assets by unlawful means, all creditors of Green Thumb would be potentially disadvantaged by it.

To allow selected creditors to artfully plead their way out of bankruptcy court would unravel the bankruptcy process and undermine an ordered distribution of the bankruptcy estate. *See Litchfield*, 135 B.R. at 804. The goal of bankruptcy is to consolidate the proceeding and avoid piecemeal litigation — a goal that would be sacrificed by permitting the district court to entertain the merits of the Sureties' suit.

Reserving the action for the trustee maintains the integrity of the bankruptcy proceeding and ensures that the individual creditors cannot hijack the bankruptcy process. If it were otherwise, there would

be "a multijurisdictional rush to judgment whose organizing principle could only be first-come-first-served." *American Nat'l Bank v. MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714 F.2d 1266, 1274 (5th Cir. 1983).*

For the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

---

* As we have resolved this case on standing grounds, we need not address the preclusion ruling issued by the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

No. 97-847-A

NATIONAL AMERICAN INSURANCE COMPANY, and
GULF INSURANCE COMPANY
Plaintiffs,

v.

RUPPERT LANDSCAPING COMPANY, INC.,
Defendant.

Decided: March 20, 1998

MEMORANDUM OPINION

This matter comes before the Court on a motion for partial summary judgment brought by the plaintiffs, National American Insurance Company ("NAIC") and Gulf Insurance Company ("Gulf") (jointly "Plaintiffs") and on a motion for summary judgment brought by the defendant, Ruppert Landscaping

Company, Inc. ("Ruppert").

This action arises from a transaction in which Plaintiffs issued numerous payments and performance bonds on behalf of Green Thumb Enterprises, Inc. ("Green Thumb"), as principal, for landscape installation and maintenance contracts in various states, including Virginia. The bonds guaranteed performance of Green Thumb's obligations under the bonded contracts, and payment to Green Thumb's obligations under the bonded contracts, and payment to Green Thumb's subcontractors and suppliers that provided labor and/or materials on the bonded contracts. NAIC issued surety bonds on behalf of Green Thumb prior to July 31, 1995, for three projects performed by Charles H. Thompkins, Co., M.A. Mortenson Construction, and OMNI Construction, Inc. Gulf issued surety bonds on behalf of Green Thumb prior to July 31, 1995, for fifteen additional projects.

Sometime in May or June, 1995, Green Thumb, through its owners, began negotiations with Ruppert, for the acquisition of some of Green Thumb's assets, including equipment, employees, and contracts, to Ruppert. The negotiations culminated in Ruppert's payment of funds to Green Thumb's primary lender and an agreement between Ruppert and Green Thumb entitled "Purchase Agreement" dated July 31, 1995.

On October 27, 1995, Plaintiffs filed an Involuntary Bankruptcy Petition against Green Thumb. The Bankruptcy was contested by Green Thumb. The Court appointed Robert G. Mayer, Esq., as the interim Chapter 7 trustee. An order for relief was entered in the main bankruptcy proceeding against Green Thumb on February 22, 1996. Green Thumb later converted the proceeding to a Chapter 11 proceeding. The case was later converted to a case under Chapter 7 in September 1996 and Gordon Payton, Esq., was appointed the new Chapter 7 trustee.

Plaintiffs allege that Ruppert was aware that the transactions between Green Thumb and Ruppert would result directly in Green Thumb's default of its bonded obligations to NAIC and Gulf and benefit Ruppert.

Specifically, Plaintiffs contend that Ruppert, as a "purchasing corporation," should be held liable for the obligations of Green Thumb for two reasons. Plaintiffs argue, first, that Ruppert, either expressly or impliedly, assumed Green Thumb's liabilities, and second, that the Ruppert/Green Thumb transaction was "fraudulent in fact." See Harris v. T.I., Inc., 243 Va. 63, 70, 413 S.E.2d 605, 609 (1992). Plaintiffs lack standing to bring such a claim.

Plaintiffs have had their day in Court and

cannot now come before this Court, because they were not satisfied with the prior adjudications. On October 27, 1995, Plaintiffs filed an Involuntary Petition in Bankruptcy against Green Thumb. The Bankruptcy was contested by Green Thumb. The Court appointed Robert G. Mayer, Esq., as the interim Chapter 7 trustee. An order for relief was entered in the main bankruptcy proceeding against Green Thumb on February 22, 1996. Green Thumb later converted the proceeding to a Chapter 11 proceeding. The case was later converted to a case under Chapter 7 in September 1996 and Gordon Peyton, Esq., was appointed the new Chapter 7 trustee.

On January 23, 1996, Ruppert filed a motion for relief from the automatic stay in connection with its secured claims in the Green Thumb Bankruptcy. Plaintiffs moved to intervene in the Lift Stay Proceeding on February 7, 1996. On December 20, 1996, a full day hearing was held in the United States Bankruptcy Court in connection with Green Thumb's bankruptcy and Ruppert's request for relief from the automatic stay. The only area in which the Court expressly reserved ruling was as to any subsequent action which might be brought by the trustee in Bankruptcy seeking to set aside the Ruppert/Green Thumb transaction as a fraudulent conveyance under 11 U.S.C. § 548.

The Order of the Court entered on December 20, 1996, is a valid and binding final judgment to which the doctrines of collateral estoppel and res judicata apply. Judgment in a lift stay proceeding is enforceable by means of both doctrines against an unsecured creditor since the creditor is in privy with the bankruptcy trustee, and thus the rights of the unsecured creditors are affected. See In re American Hawk Enter., Ltd., 52 B.R. 395, 400 (E.D. Va. 1985); In re Monument Record Corp., 71 B.R. 863 (Bankr. M.D. Tenn. 1987). In American Hawk, this Court held:

> [T]he trustee in bankruptcy stood in the shoes of all the creditors, including [the plaintiff] . . . [I]t is within the doctrine of res judicata that a trustee, under normal circumstances, represents all rights of stockholders and creditors and should be regarded as identical for such purposes . . . A trustee in bankruptcy in an action to protect or to recover bankrupt assets stands for and in the place of creditors and stockholders of the bankrupt corporation.

Id., at 400.

With regard to Green Thumb, a trustee was

appointed by the Court to represent the interests of the unsecured creditors. There was an actual hearing, Plaintiffs made an appearance, and a judgment was rendered by the Court. The judgment should be given preclusive effect as to any unsecured creditors who may seek to attack the validity of the transaction. The ruling by the Bankruptcy Court involved the same issues as are present here. The following findings are binding on Plaintiffs: (1) the transaction between Ruppert and NationsBank was a purchase, and that the NationsBank notes are not paid off; (2) the Green Thumb/Ruppert transaction was a valid transaction not entered into for any ulterior purpose; and (3) Ruppert had a valid and perfected lien on the assets of Green Thumb.

Plaintiffs are without standing to bring this claim upon a theory of successor liability since that action, like all other actions, belongs to the trustee in bankruptcy and exclusive jurisdiction for such a proceeding lies in the Bankruptcy Court. All property of the bankruptcy estate belongs to the trustee to administer under 11 U.S.C. § 541. See Steyr-Daimler-Puch of America Corp. v. Pappas, 852 F.2d 132 (4th Cir. 1988) (applying Virginia law). The Fourth Circuit has stated:

> Before the debtor or a creditor may pursue a [successor liability] claim, there must be a judicial determination

> that the trustee in bankruptcy has abandoned the claim. Without such a determination, a creditor seeking to pursue a claim cannot maintain it. Thus [the creditor's] cause of action... could only be asserted by the trustee in bankruptcy.

Id., at 136.

Plaintiffs also are without standing to bring this claim upon a theory of fraudulent transfer since that action also belongs solely to the trustee in bankruptcy. Exclusive jurisdiction for this matter is in the Bankruptcy Court. The only issue not ruled upon by the Bankruptcy Court concerned possible further action by the Trustee, if he deemed it appropriate, to bring an action under 11 U.S.C. § 548 (fraudulent conveyance). A trustee's claim that there has been a fraudulent conveyance is a core proceeding which, if prosecuted, must be prosecuted in the Bankruptcy Court under 28 U.S.C. § 157(b)(2)(H) and (O) and must be prosecuted by the trustee. Since this is the only claim left, and it belongs to the trustee, Plaintiffs' action must be dismissed. In this Circuit, the right of the trustee to bring a fraudulent conveyance is non-assignable. See Matter of Abingdon Realty, 21 B.R. 290, 293 (1982). Plaintiffs' action to set aside this sale on the basis of an alleged inadequacy of consideration belongs to Gordon Peyton, trustee and

cannot be prosecuted by Plaintiffs.

Summary judgment is appropriate when there is no genuine issue as to any material fact. See FED. R. CIV. P. 56(c). Further, an adverse party may not oppose a motion for summary judgment supported by affidavits through reliance on the allegations or denials of its pleading but must set forth by affidavits, or other means provided by Rule 56, specific facts which show a genuine issue of material fact. See FED. R. CIV. P. 56(e). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). A material fact in dispute appears when its existence or non-existence could lead a jury to different outcomes. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the nonmoving party. See id. Unsupported speculation is not enough to withstand a motion for summary judgment. See Ash v. United Parcel Serv., Inc., 800 F.2d 409, 411-12 (4th Cir. 1986). Summary Judgment is appropriate when, after discovery, a party has failed to make a "showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett,

322 (1986).

Because Plaintiffs lack standing to bring these claims, summary judgment is appropriate. Accordingly, Plaintiffs' motion for partial summary judgment is denied, Defendant's motion for summary judgment is granted, and this case is dismissed.

An appropriate order shall issue.

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
March 20, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

No. 97-847-A

NATIONAL AMERICAN INSURANCE COMPANY, and
GULF INSURANCE COMPANY,
Plaintiffs,

v.

RUPPERT LANDSCAPING COMPANY, INC.,
Defendant.

Decided: March 20, 1998

ORDER

This matter comes before the Court on the plaintiffs' motion for partial summary judgment and the defendant's motion for summary judgment. For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Plaintiffs' motion for partial

summary judgment is DENIED, Defendant's motion for summary judgment is GRANTED, and this case is DISMISSED.

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
March 20, 1998

§ 548. FRAUDULENT TRANSFERS AND OBLIGATIONS

(a)(1) The trustee may avoid any transfer of an interest of the debtor in the property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonable equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a

transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(2) A transfer of charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which.--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid

any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section--

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment; and

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer.

(3) In this section, the term, "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution--

(A) is made by a natural person; and

(B) consists of.--

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means--

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.